91-1455

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

WILLIAM D. ALLEN, D.D.S.,

Petitioner,

v.

LOUISIANA STATE BOARD OF DENTISTRY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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5 March 1992

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QUESTION PRESENTED

Five years ago in this § 1983 civil rights suit the district court abstained from hearing plaintiff's constitutional claims against the Louisiana State Board of Dentistry, its members, and its prosecutor, defendant Guy Wootan, pending the outcome of administrative proceedings and judicial review in the state system. Threafter, the Louisiana Supreme Court sustained plaintiff's constitutional due process claim. *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989). Plaintiff then moved to reopen this § 1983 federal suit, to lift the stay previously issued, and he simultaneously filed motions for partial summary judgment as to liability on his due process claim and for an interim award of attorney's fees under 42 U.S.C. § 1988.

The question presented is whether, given plaintiff's success in the state system, the federal district court's refusal to reopen plaintiff's § 1983 action is inconsistent with the obligation of federal courts to exercise jurisdiction given them under 42 U.S.C. §§ 1983 and 1988 to protect constitutional rights, is outside the narrow "exceptional circumstances" limits of *Colorado River* abstention, and is thus an abuse of discretion.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, other parties are: Dr. J. Roy Chustz, Dr. N. Francis Laborde, Guy Wootan, Esq., Kenneth M. Boudreaux, R.D.H., Dr. Lionel L. De La Houssaye, Dr. Russell R. Dimarco, Dr. Merrick A. Dugal, Jr., Dr. Bennett P. Fontenot, Dr. Ralph B. King, Jr., Dr. Joseph M. Kochansky, Dr. Herman O. Blackwood, III, Dr. David E. Simmons, and Dr. James P. Tomaszewski, each individually and in their official capacities.

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To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 948 F.2d 946 (5th Cir. 1991), and appears herein at 1-A to 10-A. The District Court's Ruling on Motion is unpublished and appears herein at 11-A to 12-A.

JURISDICTION

The judgment of the Court of Appeals was entered on December 17, 1991. Jurisdiction lies here under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

As amended, 42 U.S.C. § 1988 provides in pertinent part:

> "In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title, . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This is a federal civil rights suit brought pursuant to 42 U.S.C. §§ 1983 and 1988 seeking permanent injunctive relief, declaratory relief, money damages, and attorney's fees for violation of plaintiff Dr. William D. Allen's constitutional rights by defendant Louisiana State Board of Dentistry, its members, and its investigator/prosecutor defendant Guy Wootan.

(a) Course of Proceedings and Disposition in Court below:

Five years ago, on February 26, 1987, the trial court entered an order abstaining from hearing plaintiff's federal civil rights suit "until state court proceedings are no longer pending."[1] The Fifth Circuit, applying *Colorado*

[1] At the outset of the Board's administrative proceedings, Allen expressly reserved his federal constitutional claims for litigation in his § 1983 suit in federal court, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411,

(Continued on following page)

River abstention, affirmed. *Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100 (5th Cir. 1988). Thereafter, on Law Day 1989, the Louisiana Supreme Court reversed the decision of the Louisiana State Board of Dentistry [hereafter Board] suspending plaintiff's license to practice dentistry for violation of plaintiff's constitutional right to due process of law. *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (La. 1989). The Louisiana Supreme Court sustained plaintiff's Fourteenth Amendment claim that the commingling by the State Board of Dentistry and its prosecutor Guy Wootan of adjudicative and prosecutorial functions violated plaintiff's constitutional right to due process of law: "Wootan's involvement in drafting the opinion of the committee renders the decision infirm on both statutory and *due process* grounds." 543 So.2d at 914 (emphasis added). This is precisely the same due process claim raised in Paragraph 18 of Plaintiff's Second Supplemental and Amended federal Complaint, *viz.*:

"18.

> "The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 26, 1986, revoking plaintiff's license. This mixing of prosecutorial and adjudicative functions denied plaintiff due process of law."

By way of relief, the Louisiana Supreme Court on rehearing (June 29, 1989) ordered that: "The case is

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(Continued from previous page)

415 (1964). A complete transcript of the February 21-24, 1986, administrative hearing was filed in the district court in opposition to defendants' motion to dismiss, to stay proceedings, and for summary judgment.

remanded to the Board for a new hearing on the existing factual record before a committee composed of dentists who have had no involvement in the present case." 543 So.2d at 917. *Certiorari* was not sought by the Board.

To date, March 5th, 1992, no new administrative hearing has been held, pending resolution of Allen's further claim that the Board's effort to rehear charges dismissed on earlier judicial review for insufficient evidence, see 543 So.2d at 910, violates due process of law. *Allen v. Louisiana State Board of Dentistry*, No. 91-CA-1258, Louisiana Fourth Circuit Court of Appeal (briefing complete; oral argument continued on motion of the Board, February 4, 1992) (per Schott, C.J.). See also *Allen v. Louisiana State Board of Dentistry*, 565 So.2d 464 (La. 1990) (Board's application for stay denied).

(b) Plaintiff's Motion to Reopen and Lift Stay:

On July 12, 1990, plaintiff Allen filed a Motion to Reopen and Lift Stay "so as to allow plaintiff to file a motion for partial summary judgment and for an interim award of attorney's fees on his due process claim sustained by the Louisiana Supreme Court." 15-A, *infra*. In his Memorandum in Support of Reopening and Lifting of Stay, plaintiff cited the leading case of *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3d Cir. 1981), and authorities in six other federal circuits, *Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985); *Crane v. Fauver*, 762 F.2d 325 (3d Cir. 1985). *Exeter-West Greenwich*

Regional Sch. v. Pontarelli, 788 F.2d 47 (1st Cir. 1986), all of which support plaintiff's application to reopen this matter, lift the stay, and allow the filing of motions for partial summary judgment on res judicata grounds and for interim attorney's fees on the successfully litigated due process claim sustained by the Louisiana Supreme Court.

(c) Plaintiff's Motions for Partial Summary Judgment as to Liability and for Interim Award of Attorney's Fees:

Simultaneously with his Motion to Reopen and Lift Stay, plaintiff filed motions for partial summary judgment as to liability, 17-A, *infra*, on his successfully litigated due process claim and for an interim award of attorney's fees under 42 U.S.C. § 1988, 24-A, *infra*, the latter documented and apportioned in accordance with the rules of *Henseley v. Eckerhart*, 461 U.S. 424, 433 (1983), and *Hanrahan v. Hampton*, 446 U.S. 754, 757-58 (1980).

A certified copy of the Louisiana Supreme Court's opinion and final decree in *Allen v. Louisiana State Board of Dentistry* was attached to plaintiff's motion for partial summary judgment as to liability. Plaintiff Allen invoked the well-settled rule that cross-forum preclusion is applicable in Section 1983 actions under *Allen v. McCurry*, 449 U.S. 90, 94 (1982).

The affidavit of William D. Allen, D.D.S., the federal plaintiff herein, was attached to his motion for an interim award of attorney's fees, 28-A, *infra*. It avers that as of June 26, 1990, "I have expended over ONE HUNDRED TWENTY THOUSAND AND NO/100 ($120,000.00) DOLLARS to defend myself against charges filed against my

[sic] by the Louisaina [sic] Board of Dentistry." *Id.* The affidavit continues:

> "My financial resources are completely exhausted and I am in desperate need of an interim award of attorney's fees from the federal court on my successfully litigated due process claim so that I can continue to defend myself against the Board's unlawful procedures against me."

29-A, *infra.*

(d) The District Court's Ruling:

On October 16, 1990, the district court denied plaintiff's motion to reopen and lift stay, 11-A, *infra.* The reasons given by the court below, in their entirety, are as follows:

> "The Louisiana State Board of Dentistry has not rendered its final decision regarding the plaintiff. However, it did act on the plaintiff's motion to recuse, granting the motion and recusing the members of the board who are defendants in the lawsuit in order to avoid any appearance of impropriety. Further, the state proceedings herein are still pending.
>
> "Because the state proceedings are ongoing, the Court finds that the stay should remain in place until such proceedings are fully and finally disposed of by the state court. At that time, plaintiff can renew his motion to reopen, along with motions for summary judgment and for attorney's fees."

(e) The Fifth Circuit's Ruling:

The Fifth Circuit affirmed, holding that the district court had not abused its discretion in refusing to lift the stay "under the principles enunciated in the Supreme Court's *Colorado River* decision. 5-A, *infra*. The Fifth Circuit emphasized that 42 U.S.C. § 1988 says "may" not "must." *Id.* at 3-A, 4-A. As the Fifth Circuit saw it, "Appellant presents no basis whatsoever for this court to conclude the circumstances warranting abstention in *Allen I* have changed other than the fact that he has prevailed on a procedural due process claim in the state courts . . . . " *Id.* at 7-A. As to Allen's financial need for an interim award of fees under § 1988, the Fifth Circuit stated: "His sole evidence of financial need is a bald assertion of such in an affidavit." *Id.* at 8-A.

REASONS FOR GRANTING WRIT

A. The Fifth Circuit's Ruling Conflicts With Decisions of This Court and Other Circuit Courts of Appeals.

The Fifth Circuit's ruling is a plain "abdication of the 'virtually unflagging obligation . . . to exercise the jurisdiction given' the federal courts," *Deakins v. Monaghan*, 484 U.S. 193, 204 (1988), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); conflicts with this Court's unanimous decision reversing the Fifth Circuit's crabbed construction of 42 U.S.C. § 1988 in *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782 (1989); undermines the Congressional mandate of attorney fee awards to prevailing civil rights litigants; and conflicts with this Court's holding that "in the

absence of special circumstances a district court not merely 'may' but *must* award fees to the prevailing plaintiff," *Flight Attendants v. Zipes*, 491 U.S. 754, 761 (1989), and with circuit court of appeals' decisions holding that a court may not deny attorney's fees solely because 42 U.S.C. § 1988 grants the court discretion to do so.

B. The Question Is Substantial.

This is the first case to reach this Court where a § 1983 plaintiff has prevailed in the State's Highest Court following *Colorado River* abstention. Whether pursuit of a fee award must await another five years' abstention is an important federal question that should be settled by this Court, lest federal civil rights litigants be deprived of the Congressional promise of financial resources to fend off unconstitutional state action.

1. In *Deakins v. Monaghan*, all of the Justices contemplated plaintiff's return to federal court should he succeed in state court. Justice Blackmun said for the Court (484 U.S. at 204):

> "[W]e note that a sizeable portion of the relief sought in the federal complaint is intended to compensate respondents for injuries allegedly sustained in violation of federal constitutional rights. There can be no question that respondents have alleged injuries under federal law sufficient to justify the District Court's retention of jurisdiction."

Justice Blackmun's opinion in *Deakins* obviously contemplates "the federal proceeding recomenses in the District Court," 484 U.S. at 204, when plaintiff succeeds in the

state forum. So too, Justices White and O'Connor, both of whom anticipate "the subsequent pursuit of a damages action in federal court in the event that the state court holds that a violation of constitutional rights took place." 484 U.S. at 206 (White, J., joined by O'Connor, J., concurring). Jurisdiction was retained here. Allen does not seek damages at this stage; he is willing to await the outcome of the new administrative hearing to determine quantum, although damages are due for denial of due process, even if his loss of license is otherwise justified. *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Laje v. R.E. Thomason General Hospital*, 665 F.2d 724 (5th Cir. 1982).

2. Whatever disruption to the administrative process – and we see none – caused by an award of attorney's fees against the Board is hardly a ground for refusing to enforce the mandate of Congress: "[T]he award of counsel fees *pendente lite* would be 'especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on *all* issues.' " *Hanrahan v. Hampton*, 446 U.S. 754, 757 (1980), quoting S. Rep. No. 94-1011, p. 5 (1976) (legislative history of § 1988). "Piecemeal litigation of the issues involved in this case is thus inevitable." *Deakins v. Monaghan*, 484 U.S. at 204.

3. The Fifth Circuit's denial of access to a fee award because Allen succeeded on only "one of twenty-four claims presented in his sec. 1983 lawsuit in federal court," 7-A, *infra*, is patently in conflict with this Court's unanimous ruling in *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782 (1984), that

> "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit,' the plaintiff has crossed the threshold to a fee award of some kind."

489 U.S. at 791-92, quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The First Circuit, we quickly add, has reached precisely the result we seek here. *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984); *Exeter-West Greenwich Regional Sch. v. Pontarelli*, 788 F.2d 47 (1st Cir. 1986).

4. The very purpose of the stay issued in this case was to permit Louisiana state courts in the first instance to adjudicate "the gravamen of Allen's § 1983 action before this court." *Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100, 105 (5th Cir. 1988). Obviously, such a stay order – as this Court contemplates it – anticipates plaintiff's return to federal court in pursuit of damages and attorney's fees upon successful, final vindication in state court. Allen's success against the Board on his due process claim is a matter of public record. 543 So.2d 908 (La. 1989). The Fifth Circuit's ruling denying Allen access to his hard earned fee award is in conflict with the holding of seven other circuit courts of appeals. *Vide: Forest Hills Utility Co. v. City of Heath, Ohio*, 539 F.2d 592, 596 (6th Cir. 1976); *Williams v. Red Bank Bd. of Ed.*, 662 F.2d 1008, 1023 (3d Cir. 1981); *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Pollock v. Baxter Manor Nursing Home*, 716 F.2d 545 (8th Cir. 1983); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985); *Crane v. Fauver*, 762 F.2d 325 (3d Cir. 1985); *Lumen Const., Inc. v. Brant Const. Co., Inc.*, 780 F.2d 691, 698 (7th Cir. 1985); *Stathos v. Bowden* and *Exeter-West Regional Sch. v. Pontarelli, supra* (1st Cir.); and, most

recently, Judge Feinberg's analysis in *Temple of The Lost Sheep v. Abrams*, 930 F.2d 178, 184 (2d Cir. 1991) ("the opportunity for returning to federal court to receive monetary or injunctive relief for any constitutional violations found by the state court"), *cert. denied* 112 S.Ct. 193 (1991).

Furthermore, Allen's request for partial summary judgment as to liability, based upon cross-forum preclusion against the Board, see *Allen v. McCurry*, 449 U.S. 90, 94 (1982), is identical to that granted in *Mundich Developers, Inc. v. Hunziker*, 662 F.Supp. 1513 (S.D.N.Y. 1985); *Benjamin v. Coughlin*, 643 F.Supp. 351 (S.D.N.Y. 1986); and *Healy v. Town of Pembroke Park*, 643 F.Supp. 1208 (S.D. Fla. 1986), *aff'd* 831 F.2d 989 (11th Cir. 1987).

5. *Allen I* makes clear that the *Colorado River* test must "be applied in 'a pragmatic, flexible manner with a view to the realities of the case at hand.' " 835 F.2d at 104, quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 (1983). We have no quarrel with this. But we submit that the stunning realities of this case are twofold: The Louisiana Supreme Court has now finally adjudicated a violation by the State Board of Dentistry and its prosecutor of Dr. Allen's constitutional right of due process of law.[2] Allen is thus seeking to enforce a

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[2] The Fifth Circuit's doubt, 8-A n.4, *infra*, that federal due process standards were applied by the Louisiana Supreme Court in condemning the Board's commingling of functions is strained, to say the least. Louisiana's Administrative Procedure Act, La. R.S. 49:960(A), which prohibits commingling of functions, is federal in origin. See Comment, *Louisiana's "New" Administrative Procedure Act*, 35 La. L. Rev. 629, 631 (1975). Louisiana's due process jurisprudence is likewise federal in

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solemn judgment of Louisiana's highest court in a federal forum that congress made available to him. Considerations of comity and of "Our Federalism" – not to mention the Full Faith and Credit Act, 28 U.S.C. § 1738 – cut in Allen's favor here. *Accord, Temple of The Lost Sheep v. Abrams*, 930 F.2d at 183-184 (per Feinberg, J.), *cert. denied* 112 S.Ct. 193 (1991).

The other stark reality of this case is the exhaustive length of Allen's struggle against the Louisiana State Board of Dentistry – now in excess of six years – and the extreme cash outlay for plaintiff – now in excess of $120,000. Appendix, 28-A, *infra*. It is grossly unfair for the Fifth Circuit to say that Allen's "sole evidence of financial need is a bald assertion of such in an affidavit." 8-A, *infra*. Allen's affidavit is uncontradicted in the record; worse yet, he has had no hearing on the matter as mandated by Congress under § 1988.[3]

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origin. See *Wilson v. City of New Orleans*, 479 So.2d 891, 901-02 (La. 1985), citing *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Matter of Rollins Environ. Services, Inc.*, 481 So.2d 113, 119 n.20 (La. 1985), citing *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962). Justice Cole's opinion in *Allen* cites federal due process authority, 543 So.2d at 914, citing *Grolier, Inc. v. Federal Trade Comm'n*, 615 F.2d 1215 (9th Cir. 1890), and relies on *Bruteyn v. State Dental Council & Examining Bd.*, 380 A.2d 497, 502 (Pa. Cmwlth. 1977), which, in turn, goes as far back as *Tumey v. Ohio*, 273 U.S. 510, 532 (1926), and *Withrow v. Larkin*, 421 U.S. 35 (1975), in reliance on *federal* due process standards.

[3] The Fifth Circuit says, "He did not contest assertions that he has continued to practice dentistry in Louisiana throughout the pendency of the state and federal proceedings." 8-A, *infra*.

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6. Finally, the Fifth Circuit not only walked on eggs around *Texas Teachers Ass'n v. Garland School Dist., supra,* but its insistence that 42 U.S.C. § 1988 is discretionary only – the statute says "may," not "must" – is in conflict with *Morscott, Inc. v. City of Cleveland,* 936 F.2d 271 (6th Cir. 1991), which counsel for Allen brought to the attention of the Fifth Circuit by letter a week after the oral argument therein:

> "the Supreme Court has held that although it is within the district court's discretion to award attorney's fees under section 1988, 'in the absence of special circumstances a district court not merely "may" but *must* award fees to the prevailing plaintiff. . . . ' *Independent Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 761 (1989) (citing *Newman v. Piggie Park Enter.,* 390 U.S. 400 (1968) (emphasis in original)."

936 F.2d at 272 (parallel citations omitted). *Accord, Herrington v. County of Sonoma,* 883 F.2d 739 (9th Cir. 1989);

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The matter came up only during oral argument in the Fifth Circuit. Counsel for Dr. Allen told the Court that the only evidence of record on Allen's financial need was his affidavit, although it is of public record that it took another hard due process fight to fend off the Board's attempt to shut him down pending state judicial review. See *Allen v. Louisiana State Board of Dentistry,* 519 So.2d 1161 (La. 1988). At any rate, an affidavit is certainly more than "a bald assertion." It is a sworn statement, uncontradicted by counter affidavit in the record. And Allen's continuing to practice is irrelevant to his entitlement to a § 1988 fee award on his successfully litigated, final state court judgment sustaining his due process claim. That he has continued to practice hardly addresses the $120,000 already spent.

Szabo Food Serv. v. Canteen Corp., 823 F.2d 1073, 1084-85 (7th Cir. 1987), *cert. dismissed* 485 U.S. 901 (1988); *Universal Amusement Co. v. Hofheinz*, 616 F.2d 202, 205 (5th Cir. 1980).

None of the grounds given by the district court below, or by the Fifth Circuit, justifies refusal to entertain Allen's motions for partial summary judgment as to liability and for an award of attorney's fees under § 1988. The lower courts' unflinching abstention is inconsistent with the Congressional policy of providing a federal forum for the vindication of federal constitutional rights. *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983). Considerations of judicial economy cannot override the Congressional enactment of a federal remedial scheme, including § 1988, for violation of federal constitutional rights. *Zwicker v. Koota*, 389 U.S. 241 (1976). Practicality, flexibility, and reality all combine, we submit, in favor of the limited exercise of federal jurisdiction requested by Allen.

CONCLUSION

Petitioner has done all that Your Honors have demanded of him. He has prevailed in Louisiana's Supreme Court on his federal constitutional claim. He respectfully requests that the doors of federal justice be reopened to him, pursuant to the Congressional mandate of 42 U.S.C. §§ 1983 and 1988. Considerations of comity and "Our Federalism" support his motion to lift the federal stay – as this Court and seven courts of appeals have applied *Colorado River* abstention.

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

PAUL R. BAIER
JAMES E. BOREN
Counsel for Petitioner

5 March 1992

William D. ALLEN, D.D.S.,
Plaintiff-Appellant,

v.

LOUISIANA STATE BOARD OF DENTISTRY, et al.,
Defendants-Appellees.

No. 90-3810.

United States Court of Appeals,
Fifth Circuit.

Dec. 17, 1991.

Paul R. Baier, Baton Rouge, La., for plaintiff-appellant.

S. Mark Klyza and Cornelius R. Heusel, Kullman, Inman, Bee, Downing & Banta, New Orleans, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA, WIENER and BARKSDALE, Circuit Judges.

REYNALDO G. GARZA, Circuit Judge:

This case involves an appeal from the denial of a motion to lift a stay pending the outcome of state proceedings. For the reasons stated below, we AFFIRM the district court's decision.

THE FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are reminiscent of a law school exam for a course in Federal Courts. Most of the facts and procedural aspects are

recited in a 1988 opinion of this court (*Allen I*) and a 1989 opinion of the Louisiana Supreme Court (*Allen II*). *See Allen v. Louisiana State Board of Dentistry*, 835 F.2d 100, 102 (5th Cir.1988); *Allen v. Louisiana State Board of Dentistry*, 548 So.2d 908, 909-11 (La.1989). We briefly discuss those facts necessary to a complete understanding of our decision today.

In 1985, appellee Louisiana State Board of Dentistry brought formal charges against appellant Dr. Allen alleging various violations of the Louisiana Dental Practices Act, LA.REV.STAT.ANN. SEC. 87:751 *et seq.* On February 18, 1986, appellant filed a 42 U.S.C. Sec. 1983 action against appellee in the United States District Court for the Eastern District of Louisiana. The state charges were heard on February 21-24, 1986 and appellant challenged their outcome based on the conflicting roles of the prosecutor as both the prosecutor in fact and the author of the State Board of Dentistry's decision. Because state proceedings were still pending as of March, 1987, the federal district court abstained following a motion to dismiss filed by appellee. We affirmed the abstention finding appellant had failed to exhaust his state appellate remedies. *See Allen I*, 835 F.2d at 103 (*citing Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608, 95 S.Ct. 1200, 1210, 43 L.Ed.2d 482 (1975)). Moreover, as to appellant's claims for money damages in the Sec. 1983 action, we affirmed the district court's abstention based on the Supreme Court decision in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976). *Allen I*, 835 F.2d at 104-05.

Appellant, following our decision in *Allen I*, pursued the available appellate remedies under Louisiana state

law and achieved a ruling by that state's highest court that his due process rights had been violated by the dual role of the prosecutor in the original hearing. The Louisiana Supreme Court remanded for further proceedings before the Board of Dentistry and all parties agree these proceedings remain pending. Following the decision of the Louisiana Supreme Court, appellant filed a motion in the district court requesting the stay be lifted and that he be granted partial summary judgment and damages as to his due process claims, and that he be awarded interim attorney's fees under 42 U.S.C. sec. 1988. The district court refused to lift the stay and this refusal is the basis for appellant's current appeal.

THE LAW

In his reply brief, appellant concedes the only issue on appeal is whether the district court abused its discretion in denying his motion as it related to his claim for interim attorney's fees. As we understand appellant's position, 42 U.S.C. sec. 1988 requires this court to lift a stay, imposed on federal abstention grounds, for the sole purpose of awarding interim attorney's fees when a plaintiff has succeeded on one of over twenty claims in state court and all additional claims await resolution in state court.

Interim Attorney's Fees

42 U.S.C. sec. 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of . . . [42 U.S.C. sec.] 1983 . . . the court, *in its discretion, may* allow the prevailing

> party . . . a reasonable attorney's fee as part of its costs.

(*emphasis added*)

The United States Supreme Court has indicated that, in federal litigation, where a party has succeeded on an important issue, even thought that party may fail on the remaining issues, an interim award of attorney's fees may be awarded by a court under sec. 1988. *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782, 790, 109 S.Ct. 1486, 1492, 108 L.Ed.2d 866 (1989). This discretion is afforded the district courts to further the goal of ensuring "effective access to the judicial process" for those aggrieved of their civil rights. *See Cobb v. Miller*, 818 F.2d 1227, 1233 (5th Cir.1987) (discussing legislative history of sec. 1988). Thus in an appropriate case, interim attorney's may be awarded.[1] *See e.g., James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 858-59 (5th Cir.1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 767, 54 L.Ed.2d 781 (1978) (interim award of fees appropriate in protracted, eleven-year Title VII litigation where liability issues settled); *Carpenter v. Stephen F. Austin State Univ.*, 706 F.2d 608, 633 (5th Cir.1983) (analogizing sec. 1988 to Title VII and holding district court required to award interim fees or explain denial of same where Title VII plaintiffs afforded relief on remand).

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[1] We express no views as to the appropriateness of an award of interim attorney's fees to appellant. Moreover, we express no views in this opinion on the extensively briefed issue of whether or not appellant is a "prevailing party" for the purposes of interim attorney's fees under sec. 1988.

Unlike the cases dealing with a district court's discretion to award interim attorney's fees in federal litigation, appellant's situation present a somewhat different scenario. The district court below did not refuse to award interim attorney's fees, but rather refused to lift a stay, imposed several years earlier and upheld by this court in *Allen I*, pending the outcome of state court litigation. Thus we turn to the question of whether the district court abused its discretion by refusing to lift the stay, proceeding within the framework of the interim attorney's fee context.[2]

Continued Abstention

In *Allen I*, we upheld the district court's abstention and imposition of stay based on the principles enunciated in the Supreme Court's *Colorado River* decision.[3] *Allen I*,

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[2] While to some this may seem to be two sides of the same coin, it is clear to us that a district court, in the exercise of its discretion, might refuse to lift a stay without ever reaching the merits of an application for interim attorney's fees, particularly in a situation where such an application is only one of numerous issues placed before a court in a motion to lift a stay. Indeed, this is precisely what we today conclude the district court properly did. We do not foreclose the possibility of a fact situation wherein a district court might properly be held to have abused its discretion in refusing to lift a stay precisely due to the propriety of an application for interim attorney's fees. As will be demonstrated *infra*, however, such a fact situation is not presented by this case.

[3] In *Allen I*, appellant additionally sought to enjoin the state administrative proceedings pending against him. We refused to grant appellant his desired relief and upheld the

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835 F.2d at 104-05. We observed that "wise judicial administration, giving rise to conservation of judicial resources and comprehensive litigation" justified abstention. *Id.* at 104 (*quoting Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952), *quoted in Colorado River*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483). In particular, we recognized the factors identified in *Colorado River* and its progeny which weighed in favor of abstention. These included "the desirability of avoiding piecemeal litigation, the inconvenience of the federal forum, and the order in which jurisdiction was obtained by the concurrent forums" in addition to considerations of the state or federal source of the governing law and the extent to which "the state court proceedings could adequately protect the federal plaintiff's rights." *Id.*

Applying the *Colorado River* abstention factors in a "pragmatic, flexible manner with a view to the realities of the case at hand," we found the abstention appropriate. *Allen I*, 835 F.2d at 104. We noted the extensive discovery which had taken place at the state level and the adequacy of the state procedures in protecting appellant's rights. *Id.* Moreover, we recognized the inextricable intertwining of the issues presented in appellant's sec. 1983 claims and his issues presented at the state level. *Id.* at 105. Finally, we found appellant's federal claims "vexaitous and reactive" and concluded the exceptional circumstances

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district court's decision to abstain based upon the principles enunciated in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Allen I*, 835 F.2d at 103.

required to stay federal litigation pending the outcome of state proceedings were present. *Id.*

Appellant presents no basis whatsoever for this court to conclude the circumstances warranting abstention in *Allen I* have changed other than the fact that he has prevailed on a procedural due process claim in the state courts, one of twenty-four claims presented in his sec. 1983 lawsuit in federal court. We do not diminish the significance of this victory for appellant. *See Estate of Farrar v. Cain,* 941 F.2d 1311, 1315 (5th Cir.1991) (constitutional violation never *de minimus*) (*quoting Lewis v. Woods,* 848 F.2d 649, 651 (5th Cir.1988)). Yet we reject appellant's contention that this victory is sufficient for us to conclude that the district court abused its discretion in refusing to lift the stay. That is to say, we reject the contention that a district court abuses its discretion *per se* when it refuses to lift a stay and the basis for the requested lifting is the partial granting of a summary judgment in order to secure an interim award of attorney's fees. Because of the overwhelming presence of the identical factors which counselled initially for the imposition of a stay, the lifting of the stay at this point would be tantamount to vacating our decision in *Allen I.* Moreover, lifting the stay for the sole purpose of determining the issue of attorney's fees would directly contribute to the very piecemeal litigation abstention was in part designed to prevent. *See Allen I,* 835 F.2d at 104.

We emphasize that our ruling today is limited to the facts of appellant's particular case. He has numerous issues awaiting state proceedings and these are the basis

of the numerous unsettled claims in his sec. 1983 complaint. His sole evidence of financial need is a bald assertion of such in an affidavit. He did not contest assertions that he has continued to practice dentistry in Louisiana throughout the pendency of the state and federal proceedings. The claim upon which appellant acquired relief in state court was one which was not part of his original federal complaint but arose only after the initial state administrative proceedings were completed. Moreover, we are not persuaded the Louisiana Supreme Court even based its decision on federal constitutional grounds, a fact which would preclude the granting of summary judgment and award of attorney's fees in the first instance.[4] We do not rely on any particular one of these

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[4] Our reading of the decision of the Louisiana Supreme Court in *Allen II* indicates that court based its findings on the literal wording of the Louisiana Administrative Procedures Act and *notions* of due process. The Court stated:

> In short, we find the commingling of prosecutorial and adjudicative functions violates both the letter of the Louisiana Administrative Procedures Act and the due process goals it was designed to further.

Allen II, 543 So.2d at 913.

What we find disturbing about this passage is that it creates a great deal of uncertainty as to whether or not the Louisiana Supreme Court based its decision on state or federal due process grounds, and, moreover, whether it based its decision primarily on state statutory grounds as opposed to any due process grounds at all. Is the Act designed to further the state due process goals only? If so, it would necessarily include the breadth of the protections of the federal constitution, but did the Louisiana Supreme Court base its findings of

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facts in our decision today but rather relate them for purposes of describing the context within which the district court acted.

While numerous factors are considered in the decision to continue to abstain from hearing a case, we are

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the due process violation on protections afforded by the state constitution that are greater than those provided by the federal constitution?

While the decision in *Allen II* clearly relies on the holding in *Bruteyn v. State Dental Council & Examining Bd.*, 32 Pa.Cmwlth. 541, 380 A.2d 497, 502 (1977), the dissent of Justice Calogero clearly treats that case as based on Pennsylvania law. *See Allen II*, 543 So.2d at 918 ("If indeed we are to rely on Pennsylvania law as persuasive authority for resolving this issue, it would appear [other Pennsylvania cases are] more factually similar than *Bruteyn*.") Moreover, the concurring opinion of Justice Dennis indicates that as to the alleged illegal search claims of appellant, the Louisiana Supreme Court relied on state constitutional grounds. *See Allen II*, 543 So.2d at 917 (majority incorrectly concludes Louisiana constitutional not broader than U.S. constitution). Finally, appellant clearly alleged violations of both the state and federal due process clauses in the state proceedings.

We do not intend to make any expression regarding the extent to which this matter is to be resolved one way or another. We merely point out that the issue is not clear and could lead a district court to request some clarification on the matter. *See e.g., California v. Krivda*, 409 U.S. 33, 35, 93 S.Ct. 32, 32-33, 34 L.Ed.2d 45 (1972) (remand necessary to determine basis of California Supreme Court ruling for purposes of federal jurisdiction). This aspect of the state court decision merely contributes to a factual situation which we find does not compel us to conclude the district court abused its discretion in refusing to lift the stay.

unpersuaded the particular facts of this case require us to conclude the district court abused its discretion when it refused to lift the stay. We reiterate that our ruling is not meant to indicate that a district court never abuses its discretion when it refuses to lift a stay based upon a request for interim attorney's fees; we see no reason for a refusal to lift a stay simply because the person seeking to have it lifted is doing so to seek an interim award of attorney's fees. This fact, however, does not diminish the need for a district court to completely and thoroughly review the relevant factors under the principles enunciated in *Colorado River* and its progeny, or any other basis for an initial stay, in light of the totality of the circumstances. As we have stated, that review here has not changed in any meaningful way from our decision in *Allen I*. For these reasons, the judgment of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S. (Filed Oct 16, 90)

versus

LOUISIANA STATE BOARD OF DENTISTRY, et al

RULING ON MOTION

Plaintiff, Dr. William D. Allen ("Dr. Allen") has filed a motion to reopen and lift the stay of this action in order that he be allowed to file a motion for summary judgment as to liability and for an interim award of attorney's fees. Defendants oppose the re-opening of this matter and the lifting of the stay at this time. On May 3, 1988, the Court entered an order staying further action in this Court pending final state administrative disposition. Plaintiff seeks to have the matter reopened and the stay lifted at this time. The Louisiana State Board of Dentistry has not rendered its final decision regarding the plaintiff. However, it did act on the plaintiff's motion to recuse, granting the motion and recusing the members of the board who are defendants in the lawsuit in order to avoid any appearance of impropriety. Further, the state court proceedings herein are still pending.

Because the state proceedings are ongoing, the Court finds that the stay should remain in place until such proceedings are fully and finally disposed of by the state court. At that time, plaintiff can renew his motion to reopen, along with the motions for summary judgment and for attorney's fees.

Accordingly, for the above and foregoing reasons,

IT IS ORDERED that the motion of plaintiff Dr. William D. Allen to reopen and lift stay be and is hereby DENIED.

New Orleans, Louisiana, this 16 day of October, 1990.

/s/ Marcel Livaudais
MARCEL LIVAUDAIS, JR.
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS		
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	NUMBER 86-0623
	*	SECTION "E"
	*	MAGISTRATE 1

MOTION TO REOPEN AND LIFT STAY

(Filed July 12, 1990)

Plaintiff, Dr. William D. Allen, by his undersigned attorneys of record, E. Wade Shows (trial attorney) and Paul R. Baier, moves this Court to reopen this matter and lift the stay or proceedings previously entered by the Court so that plaintiff may file a motion for partial summary judgment as to liability on his due process claim and for an interim award of attorney's fees, and as grounds therefor respectfully states:

1. This cause of action was brought pursuant to 42 U.S.C. § 1983 and requested, *inter alia*, declaratory and injunctive relief prohibiting the defendant Louisiana State Board of Dentistry, its defendant Board members, and its prosecutor defendant, Guy Wootan, from unconstitutionally commingling prosecutorial and adjudicative functions by defendant Guy Wootan's drafting the decision suspending plaintiff's license to practice dentistry. See paragraphs 18, 21, 23(ii), Second Supplemental and Amended Complaint filed September 18, 1986. Plaintiff also prayed for money damages for violation of his procedural due process rights and for an award of attorney's fees. *Id.*, paragraph 25(b), 26(b), 27.

2. On February 26, 1987, this Court entered an order abstaining from hearing this cause until state court proceedings are no longer pending. A copy of this Court's abstention order is attached hereto.

3. On May 1, 1989, the Louisiana Supreme Court reversed the decision of defendant Louisiana State Board of Dentistry suspending plaintiff's license to practice for violation of plaintiff's constitutional right to due process of law. See 543 So.2d 908. A certified copy of the Louisiana Supreme Court's opinion and judgment is attached as Appendix A to Plaintiff's Motion for Partial Summary Judgment As to Liability, a copy of which is attached hereto. The Louisiana Supreme Court sustained plaintiff's Fourteenth Amendment claim that the commingling by the State Board of Dentistry and defendant Guy Wootan of prosecutorial and adjudicative functions violated plaintiff's constitutional right due to process of law.

4. On September 11, 1989, the Louisiana Supreme Court denied rehearing, rendering its May 1, 1989, decision a final judgment regarding violation of plaintiff's due process rights.

5. As is more fully elaborated in the memorandum and attachments filed in support of reopening and lifting of stay, plaintiff is entitled to a partial summary judgment as to liability against defendants on plaintiff's procedural due process claim and interim award of attorney's fees, pursuant to 42 U.S.C. §1988, so as to allow Dr. Allen to defend himself at the administrative rehearing ordered by the Louisiana Supreme Court and scheduled for August 4, 1990.

WHEREFORE, Dr. William D. Allen prays for a reopening of this case and a lifting of the stay order previously issued so as to allow plaintiff to file a motion for partial summary judgment and for an interim award of attorney's fees on his due process claim sustained by the Louisiana Supreme Court.

Baton Rouge, Louisiana, this 10th day of June, 1990.

Respectfully submitted,

SHOWS, COHN & CALI
644 St. Ferdinand
P. O. Drawer 4425
Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS

/s/ Paul R. Baier
PAUL R. BAIER

CERTIFICATE

I hereby certify that a copy of the Motion to Reopen and Lift Stay has this date been served by placing same in the U.S. Mail, postage prepaid, upon P. J. Stakelum, III, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney of record for defendants.

Baton Rouge, Louisiana, this 10th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS		
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	NUMBER 86-0623
	*	SECTION "E"
	*	MAGISTRATE 1

MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY

(Filed July 12, 1990)

Plaintiff, Dr. William D. Allen, by his undersigned attorneys of record, E. Wade Shows (trial attorney) and Paul R. Baier, moves pursuant to Fed. R. Civ. P. 56(a) for partial summary judgment as to liability in his favor against defendants, Louisiana State Board of Dentistry, Dr. J. Roy Chustz, Dr. N. Francis Laborde, Guy Wootan, Kenneth M. Boudreaux, R.D.H., Dr. Lionel L. de la Houssaye, Dr. Russell R. DiMarco, Dr. Merrick A. Dugal,

Jr., Dr. Bennett P. Fontenot, Dr. Ralph B. King, Jr., Dr. Joseph M. Kochansky, Dr. Herman O. Blackwood, III, Dr. David E. Simmons, and Dr. James P. Tomaszewski, each individually and in their official capacities, and as grounds therefor respectfully states:

1. This cause of action was brought pursuant to 42 U.S.C. Sec. 1983 and requested, *inter alia*, declaratory and injunctive relief prohibiting the defendant Louisiana State Board of Dentistry, its defendant Board members, and its prosecutor defendant, Guy Wootan, from unconstitutionally commingling prosecutorial and adjudicative functions by defendant Guy Wootan's drafting the decision suspending plaintiff's license to practice dentistry. See paragraphs 18, 21, 23(ii), Second Supplemental and Amended Complaint filed September 18, 1986. Plaintiff also prayed for money damages for violation of his procedural due process rights and for an award of attorney's fees. *Id.*, paragraphs 25(b), 26(b), 27.

2. On February 26, 1987, this Court entered an order abstaining from hearing this cause until state court proceedings are no longer pending.

3. On May 1, 1989, the Louisiana Supreme Court reversed the decision of defendant Louisiana State Board of Dentistry suspending plaintiff's license to practice for violation of plaintiff's constitutional right to due process of law. See 543 So.2d 908. A certified copy of the Louisiana Supreme Court's opinion and judgment is attached hereto as Appendix A. The Louisiana Supreme Court sustained plaintiff's Fourteenth Amendment claim that the commingling by the State Board of Dentistry and defendant Guy Wootan of prosecutorial and adjudicative

functions violated plaintiff's constitutional right due to process of law.

4. On September 11, 1989, the Louisiana Supreme Court denied rehearing, rendering its May 1, 1989, decision a final judgment regarding violation of plaintiff's due process rights.

5. As is more fully elaborated in the Memorandum of Law filed in support of this motion, the judgment of the Louisiana Supreme Court sustaining plaintiff's Fourteenth Amendment due process claim is *res judicata* and the defendants are precluded herein from relitigating this claim as a matter of law.

There is no genuine dispute as to the foregoing facts which establish as a matter of law that plaintiff is entitled to a partial summary judgment as to liability against defendants on the claim asserted in paragraph 18 of Plaintiff's Second Supplemental and Amended Complaint, *viz.*:

"18.

> "The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 24, 1986, revoking plaintiff's license. This mixing of prosecutorial and adjudicative functions denied plaintiff due process of law."

WHEREFORE, Dr. William D. Allen prays for a partial summary judgment in his favor and against defendants for violation of plaintiff's Fourteenth Amendment procedural due process rights as declared by the Louisiana Supreme Court. Plaintiff further prays, pursuant to Fed. R. Civ. P. 56(c), that the Court set this matter for jury trial to determine the amount of damages recoverable by

plaintiff on his Fourteenth Amendment due process claim as soon as the Court's schedule reasonably allows.

Baton Rouge, Louisiana, this 10th day of July, 1990.

By Attorneys,

SHOWS, COHN & CALI
644 St. Ferdinand
P. O. Drawer 4425
Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

/s/ Paul R. Baier
PAUL R. BAIER

CERTIFICATE

I hereby certify that on the 10th day of July, 1990, a copy of the foregoing Motion for Partial Summary Judgment and all supporting memoranda and documents were mailed to P. J. Stakelum, III of Wootan & Stakelum, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney for defendants.

Baton Rouge, Louisiana, this 10th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS	*	NUMBER 86-0623
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	SECTION "E" MAGISTRATE 1

STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE

In conjunction with the motion of Dr. William D. Allen for partial summary judgment as to liability on plaintiff's due process claim, and in compliance with Local Rule 3.9 of the Local Rules of the United States District Court for the Eastern District of Louisiana, the plaintiff contends that there is no genuine issue as to the following material facts:

1.

The opinion and judgment of the Louisiana Supreme Court in *Allen v. Louisiana State Board of Dentistry*, 543 So.2d 908 (No. 88-C-2736), a certified copy of which is attached to plaintiff's motion for partial summary judgment as Appendix A, sustained the same procedural due process Fourteenth Amendment constitutional claim as that asserted in Paragraph 18 of plaintiff's Second Supplemental and Amended Complaint filed herein, viz.:

"18.

> "The Board's lawyer and prosecutor, Mr. Guy Wootan, drafted the final decision of March 24, 1986, revoking plaintiff's license. This mixing of prosecutorial and adjudicative functions denied plaintiff due process of law."

Respectfully submitted,

SHOWS, COHN & CALI
644 St. Ferdinand
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Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

CERTIFICATE

I hereby certify that on this date a copy of the foregoing Statement of Material Facts as to Which There is No Genuine Issue was mailed to P. J. Stakelum, III, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney of record for defendants.

Baton Rouge, Louisiana, this 10th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

WILLIAM D. ALLEN, D.D.S.	*	CIVIL ACTION
VERSUS	*	NUMBER 86-0623
LOUISIANA STATE BOARD OF DENTISTRY, DR. J. ROY CHUSTZ, DR. N. FRANCIS LABORDE, GUY WOOTAN, KENNETH M. BOUDREAUX, R.D.H., DR. LIONEL L. DE LA HOUSSAYE, DR. RUSSELL R. DIMARCO, DR. MERRICK A. DUGAL, JR., DR. BENNETT P. FONTENOT, DR. RALPH B. KING, JR., DR. JOSEPH M. KOCHANSKY, DR. HERMAN O. BLACKWOOD, III, DR. DAVID E. SIMMONS, AND DR. JAMES P. TOMASZEWSKI, EACH INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES	*	SECTION "E" MAGISTRATE 1

MOTION FOR INTERIM AWARD OF ATTORNEY'S FEES

(Filed Jul 12, 90)

Plaintiff moves the Court for an Order awarding interim attorney's fees and other expenses in the above-styled cause pursuant to 42 U.S.C. § 1988 and as grounds therefore shows unto the Court as follows:

1. Plaintiff was represented in this cause by J. Peyton Parker, Jr., who has with the Court's consent withdrawn his appearance, and Professor Paul R. Baier, of the LSU Law Center, who continues to represent plaintiff in this action together with E. Wade Shows, Esq.

2. This cause of action was brought pursuant to 42 U.S.C. § 1983 and requested, *inter alia*, declaratory and injunctive relief prohibiting the defendant Louisiana State Board of Dentistry and its prosecutor, defendant Guy Wootan, from unconstitutionally commingling prosecutorial and adjudicative functions by defendant Wootan's drafting the decision suspending plaintiff's license to practice dentistry. See ¶¶18, 21, 23(ii), Second Supplemental and Amended Complaint, filed September 18, 1986.

3. On February 26, 1987, this Court entered an order abstaining from hearing this cause until state court proceedings are no longer pending.

4. On May 1, 1989, the Louisiana Supreme Court reversed the decision of defendant Louisiana State Board of Dentistry suspending plaintiff's license to practice for violation of plaintiff's constitutional right to due process of law. See 543 So.2d 908. The Louisiana Supreme Court sustained plaintiff's constitutional claim that the State Board and defendant Wootan's commingling of prosecutorial and adjudicative functions violated plaintiff's constitutional right to due process of law.

5. On September 11, 1989, the Louisiana Supreme Court denied rehearing, rendering its May 1, 1989, decision a final judgment.

6. The defendant, Louisiana State Board of Dentistry, has noticed an administrative rehearing of its charges against Dr. Allen for August 4, 1990, pursuant to the remand order of the Louisiana Supreme Court.

7. During the four years' pendency of state court proceedings challenging the defendant Board's suspension of plaintiff's license, plaintiff has incurred out-of-pocket costs and expenses, including attorney's fees, of ONE HUNDRED TWENTY THOUSAND FOUR HUNDRED FORTY-SIX AND 96/100 ($120,446.96) DOLLARS.

8. An interim award of attorney's fees is necessary to permit plaintiff to defend himself against the Board's reassertion of charges against him.

9. Plaintiff has achieved substantial success against the defendant State Board of Dentistry by resort to the Louisiana Supreme Court for vindication of his due process claim against the Board.

10. The reversal of defendant State Board's suspension of plaintiff's license and the dismissal on judicial review of nine (9) of the State Board's specifications of charges against Dr. Allen in the state courts constitutes substantial relief for which plaintiff is entitled to an award of reasonable attorney's fees pursuant to 42 U.S.C. § 1988, as prayed for in Plaintiff's Second Supplemental and Amended Complaint, ¶¶27, 28(5.).

11. Plaintiff's attorney, Paul R. Baier, expended a total of 318.5 hours in vindicating plaintiff's constitutional due process claim asserted in Paragraph 18 of Plaintiff's Second Supplemental and Amended Complaint, including his representation of Dr. Allen on this

due process claim in the state courts and his representation to date in this Court as evidenced by Paul R. Baier's affidavit and as itemized in Appendix A, attached hereto and incorporated by reference herein.

12. The prevailing market rate for the kind of quality of services furnished by plaintiff's counsel, Professor Paul R. Baier, in vindicating plaintiff's due process rights in the state court proceedings is $200.00 per hour, as evidence by affidavit of other knowledgeable counsel attached hereto as Appendix B, which multiplied by the total hours expended results in total attorney's fees of SIXTY-THREE THOUSAND SEVEN HUNDRED AND NO/100 ($63,700.00) DOLLARS, inclusive of hours expanded in preparation of motions to reopen, for partial summary judgment and the fee application itself and supporting memoranda.

WHEREFORE, plaintiff, William D. Allen, D.D.S., prays that there be judgment herein in his favor and against defendants, granting him an interim award of attorneys' fees in the amount of SIXTY-THREE THOUSAND SEVEN HUNDRED AND NO/100 ($63,700.00) DOLLARS.

Baton Rouge, Louisiana, this 10th day of July, 1990.

By Attorneys,

SHOWS, COHN & CALI
644 St. Ferdinand
P. O. Drawer 4425
Baton Rouge, Louisiana 70821
(504) 346-1461

/s/ E. Wade Shows
E. WADE SHOWS
Trial Attorney

/s/ Paul R. Baier
PAUL R. BAIER

CERTIFICATE

I hereby certify that on the 10th day of July, 1990, a copy of the foregoing Motion for Interim Award of Attorney's Fees and all supporting memoranda and documents were mailed to P. J. Stakelum, III of Wootan & Stakelum, Suite 2200, 1515 Poydras Street, New Orleans, Louisiana 70112, attorney for defendants.

Baton Rouge, Louisiana, this 11th day of July, 1990.

/s/ E. Wade Shows
E. WADE SHOWS

AFFIDAVIT OF WILLIAM D. ALLEN, D.D.S.
IN SUPPORT OF INTERIM
AWARD OF ATTORNEY'S FEES

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, William D. Allen, D.D.S., being duly sworn, do depose and say that:

I have expended over ONE HUNDRED TWENTY THOUSAND AND NO/100 ($120,000.00) DOLLARS to defend myself against charges filed against my [sic] by the Louisaina [sic] State Board of Dentistry.

The Louisiana Supreme Court has sustained my constitutional claim that the Board and its prosecutor Guy Wootan violated my due process rights in the manner in

which they proceeded against me in this matter. Two of my former assistants have confessed under oath to breaking into my office to get information they turned over to the Board's prosecutor Wootan, who used the information against me. They have also confessed under oath to perjury in this matter.

The new committee that will rehear the Board's charges against me consists of Board members who are defendants in the federal suit I have filed and who cannot possibly give me a fair hearing because of bias and prejudice against me.

My financial resources are completely exhausted and I am in desperate need of an interim award of attorney's fees from the federal court on my successfully litigated due process claim so that I can continue to defend myself against the Board of Dentistry's unlawful procedures against me.

Baton Rouge, Louisiana, this 26 day of June, 1990.

/s/ William D. Allen
WILLIAM D. ALLEN

SWORN TO AND SUBSCRIBED before me this 26th day of June, 1990.

/s/ Illegible
NOTARY PUBLIC
ss E. Wade Shows